IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY - - - Petitioner

versus

PAUL CUMMINS - - - - - - Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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AUTHORITIES CITED

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BRIEF FOR RESPONDENT PAUL CUMMINS IN OPPOSITION

The respondent, Paul Cummins (hereinafter referred to as "Cummins"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F. 2d 544 and 10 F.E.P. Cases 974.

COUNTERSTATEMENT

Cummins was hired by Parker Seal Company in 1958. In 1965 he became a supervisor. In 1970 he became a member of the World Wide Church of God. One of the tenets of that church is that the adherent could not work from sundown on Friday to sundown on Saturday. Cummins advised Parker Seal of this religious need and for 14 months he worked as a supervisor without being required to work on his Sabbath. A change in plant managers at the Parker Seal plant at Berea, Kentucky, coupled with complaints of fellow employees of Cummins, caused Cummins to be presented with an ultimatum: violate the tenets of your religious faith or be fired. He was fired on September 3, 1971.

The majority opinion of the Sixth Circuit carefully sets forth the facts and concludes that Parker Seal had provided reasonable accommodation to Cummins' religious needs for 14 months, and had not made any showing of undue hardship on the conduct of the employer's business at the time Cummins was fired.

The decision is clearly correct on the facts. Contrary to the introductory statement of petitioner, this case only presents the Court with the opportunity to consider whether the prohibition against employment discrimination because of religion contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., violates the establishment clause of the First Amendment to the Constitution of the United States.

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit Correctly Applied the Statute and E.E.O.C. Regulation to the Facts of this Case

For all of its exaggerated statements in its petition concerning the effect of Cummins' failure to work on his Sabbath and its effect on Parker Seal production, petitioner is left with one hard fact: Cummins was fired, after an accommodation of over a year, because his absence from work on Saturday caused complaints from other employees.

The Sixth Circuit found as a matter of law that:

> "The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business." 516 F. 2d 544, 550.

The Court conceded that such complaints and attendant morale problems could lead to chaotic personnel problems which would amount to undue hardship, but correctly found that such was in no way the fact in this case.

Parker Seal attempts to twist the reasonable accommodation of Cummins religious needs for over a year and the absence of any undue hardship on it during that period to its advantage by claiming that it was penalized because of these facts.

Parker Seal was not, as it claims, estopped from proving undue hardship in the conduct of its business. Parker Seal did not, and indeed could not, establish

facts which amounted to an undue hardship at the time Paul Cummins was fired. Nothing had changed in the 14 months Cummins was reasonably accommodated except a change in plant managers and an increase in the complaints of fellow employees. Parker Seal management reacted by telling Cummins to work on Saturday or be fired.

The Company's theory as adopted by the Kentucky Commission on Human Rights and presumably the District Court was that since the policy of requiring all employees to work on Saturdays was uniformly applied, it was acceptable (App. A, p. 5a). This is not the law as enunciated by this Court in *Griggs* v. *Duke Power Company,* 401 U. S. 424, 427, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971):

> "The Act (Title VII) proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."
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> * * * * * * *
>
> "But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

The Kentucky Commission on Human Rights and the District Court misapplied the applicable law, and the legal error was corrected by the Court of Appeals.

The company's contention that there were difficulties after Cummins converted and that this new

situation was not ideal from a management viewpoint, can in no way be construed to constitute "undue hardship." Admittedly, there may often be some complaints and even morale problems which develop because an employer complies with Title VII. Anything—any law—which affects the status quo and brings about change will be disliked by many.

The production employees in a plant cannot be allowed to determine what laws the employer will obey in a plant. Congress has set forth the public policy of the United States which requires that employers not discriminate against employees because of their religion. This requirement only has meaning if the E.E.O.C. and the Courts require employers to seriously consider the religious needs of employees.

The Sixth Circuit was correct in holding that Parker Seal had failed to meet its burden of proving undue hardship, and the writ should be denied.

II.

Title VII of the Civil Rights Act of 1964 Does Not Violate the Establishment Clause of the First Amendment

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Court has frequently grappled with the tensions existing between the Free Exercise Clause and the Establishment Clause. The effort of the Court has been to find a neutral course between the two clauses, "both

of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other." *Walz* v. *Tax Commissioner,* 397 U. S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

In Committee for *Public Education* v. *Nyquist,* 413 U. S. 756, 772 (1973) this Court in reviewing its previous decisions outlined its standards:

> "Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose, e.g., *Epperson* v. *Arkansas,* 393 U. S. 97, (1968); second, must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan* v. *Maryland,* 366 U. S. 420, (1961); *School District of Abington Township* v. *Schempp,* 374 U. S. 203, (1963); and, third, Must avoid excessive government entanglement with religion, e.g., *Walz* v. *Tax Commissioner, supra.*

The pertinent statute, 42 U.S.C. Sec. 2000 (e) (j) and regulation, 29 C.F.R. Sec. 1605.1 meets these tests and are fully consistent with the First Amendment.

Congress, in legislating the portion of Title VII applicable to religious discrimination, sought to provide a setting where all religions, regardless of their various tenets, could be freely exercised.

Parker argues that by requiring an employer to accommodate the religious needs of employees Congress has violated the First Amendment. That logic would mean that by outlawing religious discrimination at all, Congress violated the First Amendment.

As stated by the Sixth Circuit:

> "In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions." 516 F. 2d 544, 553.

The Court went on to point out that there is no direct relationship between government and the religion at all. Congress was concerned with the relationship between the employer and employee and to insure that said employee was not penalized for exercising his right to practice a religion.

In *Sherbert* v. *Verner,* 374 U. S. 398 (1963), this Court in replying to a contention that the Court's resolution of the issue would foster an establishment of religion, said: "Payment will be made to her not as a Seventh Day Adventist, but as an employed worker," 374 U. S. 398 at 412.

This Court recognized in *Sherbert* v. *Verner, supra,* that the effect of the declaration of ineligibility for unemployment insurance for refusal to work on Saturday forced the plaintiff to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," 374 U. S. 398 at 404.

Such a dilemma, imposes a burden on the free exercise of religion. The religious accommodation provision of Title VII requires no more than does *Sherbert.* Both require that the employee's religious beliefs and the free exercise thereof be taken into account, and that

no penalty or burden be imposed upon the employee as a consequence of his religious beliefs unless a compelling state interest is demonstrated (which was not the case in *Sherbert*) in a state action case or "undue hardship" is shown (which was not the case in this action) in a private employer case brought pursuant to Title VII. See also *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972).

The burden which Parker had to meet in this case to demonstrate that the religious discrimination prohibited by Title VII breached the Establishment Clause required more than a finding that some religious purpose or effect was involved in Title VII. They had to go further and show that the religious accommodation provision of Title VII and E.E.O.C. Regulation 1605.1(b) promote any one of the evils against which the Establishment Clause protects.

Title VII and the E.E.O.C. regulation are not absolute. An individual's religious beliefs must give way to an employer's needs. An employee's beliefs and practices must give way if an employer can demonstrate said practices are unreasonable or that the practices will do "undue hardship" to the employer. It is a practical statute designed to allow for the religious diversity for which our forefathers fought, while, at the same time, allowing employers to compete in the business world.

The Sixth Circuit has correctly concluded that there is no conflict between Title VII and the Constitution, and the Writ should be denied.

III.

Any Conflict of Views in the Sixth Circuit Should Be Resolved by That Court

Respondent must candidly admit that he is as perplexed as petitioner by the recent decision of the Sixth Circuit in *Reid* v. *Memphis Publishing Co.,* 11 F.E.P. Cases 129 (CA 6, 1975).

The *Reid* case may well point out the fact that each case involving a "reasonable accommodation" and "undue hardship" must stand on its own set of facts. Without agreeing to the correctness of the *Reid* decision, it should be pointed out that Title VII does not require every employer, in every circumstance, to accommodate the religious needs of every employee.

A Petition for Rehearing and Suggestion for En Banc review was filed by Reid in the Sixth Circuit on September 29, 1975. No decision has been rendered on this request as of this date. The task of justifying and reconciling the Reid decision with this case is properly before the Sixth Circuit at this time.

CONCLUSION

The decision of the Sixth Circuit in this case is factually correct. The only reason which could possibly justify grant of the Writ is the conviction that Congress could not constitutionally require employers not to discriminate against employees and potential employees because of their religion. Title VII strikes the proper balance between the free exercise and es-

tablishment clauses of the First Amendment. For the foregoing reasons, respondent Paul Cummins, submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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